United States Department of the Interior

OFFICE OF THE FIELD SOLICITOR
Tulsa Office, Southwest Region
P.O. Box 3156
Tulsa, Oklahoma 74101

September 21, 1993

MEMORANDUM

TO: Associate Solicitor, Division of Indian Affairs

FROM: M. Sharon Blackwell, Field Solicitor, Tulsa

SUBJECT: Cherokee Nation of Oklahoma - Trust Acquisition of 15.99 acres, City of Catoosa, Oklahoma, for Gaming Purposes

This is in response to your request that this office examine the subject acquisition for compliance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* (IGRA). Specifically, you have advised that 25 U.S.C. § 2719(a)(2)(A)(i) generally prohibits gaming on lands acquired after October 17, 1988, the date of enactment of the IGRA, unless, among other exceptions, the newly acquired lands "are located in Oklahoma and are within the boundaries of the Indian tribe's former reservation as defined by the Secretary..."[1] The lands designated in the treaties between the United States and the Five Civilized Tribes in Oklahoma (the Cherokee Nation, the Muscogee (Creek) Nation, the Seminole Nation of Oklahoma, the Chickasaw Nation and the Choctaw Nation) were granted to the Tribes in fee simple.[2] Those lands have been referred to from time to time as "treaty lands" rather than "reservation lands".

The proposed acquisition is located in the City of Catoosa, Rogers County, Oklahoma. The issue you have posed is whether or not the proposed acquisition, and indeed any trust acquisition for gaming purposes for any of the Five Civilized Tribes in Oklahoma, may be

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[1]Initially the acquisition must meet the requirements of the land acquisition regulations found in 25 C.F.R. Part 151. 25 C.F.R. § 151.2(f) provides that for purposes of tribal land acquisition "in the State of Oklahoma ..."Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary."

[2]Creek and Seminole Treaty of Jan. 4, 1845, 9 Stat. 821; Choctaw Treaty of Jan. 17, 1837, 11 Stat. 573; Cherokee Treaty of Dec. 29, 1835, 7 Stat. 478 (1836); Creek Treaty of Feb. 14, 1833, 7 Stat. 417 (1834); Choctaw Treaty of Sept. 27, 1830, 7 Stat. 333 (1831). *See also* W.P. SEMPLE, OKLAHOMA INDIAN LAND TITLES 3-17 (1952).

accomplished under the limiting language of the statute, that a gaming acquisition in Oklahoma be within the tribe's former reservation boundary.[3]

The Indian Gaming Regulatory Act

The legislative history to 25 U.S.C. § 2719(a)(2)(A)(i) began long before the 1988 enactment of the IGRA. The first bill to address Indian gaming, H.R. 4566, was introduced in 1983 by Representative Morris Udall. Hearings were held on H.R. 4566, but no other action was taken. On April 2, 1985, Representatives Udall, McCain, Richardson and Bates introduced H.R. 1920 which contained regulatory requirements similar to H.R. 4566, and Senator DeConcini introduced a companion bill, S. 902, in the Senate on April 4, 1985. None of the bills contained limitations on gaming activities on newly acquired trust lands.

On July 31, 1985, Representative Bereuter of Nebraska, introduced H.R. 3130 which stated the purpose to be to "Prohibit the granting of trust status to Indian lands to be used for the conduct of gaming activities."[4] On November 14, 1985, Rep. Bereuter testified before the House Committee on Interior and Insular Affairs that H.R. 3130 was intended to address the situation where a tribe

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[3]Although 25 U.S.C. § 2719(c) provides that the provisions of the IGRA are not intended to enlarge nor diminish the authority and responsibility of the Secretary to take land in trust, an existing directive of former Secretary Manuel Lujan requires the Bureau of Indian Affairs, in those instances where the stated purpose of the acquisition is for gaming purposes, to determine if the gaming would be in compliance with the IGRA prior to the acquisition.

[4]Section 1 of the proposed H.R. 3130 provided:

> SECTION 1. RESTRICTION OF SECRETARY'S AUTHORITY
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> (a) IN GENERAL.--Except as provided in subsection (b), the Secretary shall acquire no land in trust status if such land is located outside the boundaries of the applicant Indian tribe's reservation and is to be used for the conduct of gaming activities. Any land acquired in trust status after July 31, 1985, shall automatically lose such status if such land is used for gaming activities.
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> (b) CONCURRENCE OF LOCAL GOVERNMENT.--Subsection (a) shall not apply if the Indian tribe requesting the acquisition of land in trust status obtains the concurrence of the governor of the state and the legislative bodies of all local governmental units in which the land is located.

requests the Secretary to put lands in trust that are located in cities as far as 60 to 95 miles from the reservation. His prepared statement suggested that it was not "good policy" to establish gaming on any land not contiguous to a reservation against the wishes of the directly affected political subdivisions; that it was inappropriate for the Secretary to put new lands in trust because doing so would circumvent state law enforcement and result in lost revenues to state and local governments; and that allowing Indian gaming in an off-reservation community would foster ill feelings in an already strained relationship between the tribe and the opposing community. *Indian Gambling Control Act, Part II, Hearings before the House Interior and Insular Affairs Committee*, 99th Cong., 1st Sess. 20 (1985)(Statement of Doug Bereuter, Rep. R-Nebr.).

Representative Bereuter's testimony and prepared statement were well received by the Committee with Chairman Udall expressing concern about competition between charitable organizations and tribes, and Representative Manual Lujan of New Mexico commenting on the cities' loss of tax revenues. Representative Bereuter requested inclusion of the provisions of H.R. 3130 in any final regulatory bill that was developed. *Id.* at 24-26.

After amendment, including the insertion of language which made Class II and Class III gaming unlawful on lands acquired by the Secretary outside the boundaries of a tribe's reservation, the House of Representatives passed H.R. 1920 on April 21, 1986, and sent it to the Senate where it was received that day and referred to the Select Committee on Indian Affairs. On June 16, 1986, Senator Laxalt introduced similar legislation, S. 2557, which along with S. 902, was considered by the Select Committee. On September 17, 1986, the Select Committee ordered H.R. 1920 reported with an amendment in the nature of a substitute.

With regard to newly acquired lands, the section by section summary of amended H.R. 1920, reported in S. REP. No. 99-493, 99th Cong., 2d Sess. 10 (1986), provided in pertinent part:

> [Section 4] Subsection (a) makes Indian gaming unlawful on any lands taken into trust by the Secretary of the Interior after the date of enactment of this Act, if such lands are located outside the boundaries of such tribe's reservation. It also provides, however, that for purposes of Oklahoma, where many Indian tribes occupy and hold title to trust lands which are not technically defined as reservations, such tribes may not establish gaming enterprises on lands which are outside the boundaries of such tribes former reservation in Oklahoma, as defined by the Secretary of the Interior, unless such lands are contiguous to lands currently held in trust for such tribes. Functionally, this section treats these Oklahoma tribes the same as all other Indian tribes. This section is necessary, however, because of the unique historical and legal differences between Oklahoma and tribes in other areas.

> Subsection (a) also applies the same test to the non-Oklahoma tribes whose reservation boundaries have been removed or rendered unclear as a result of federal court decisions, but where such tribe continues to occupy trust land within the boundaries of its last recognized reservation. This section is designed to treat these tribes in the same way they would be treated if they occupied trust land within a recognized reservation. It is not intended to allow a tribe to take land into trust, for the purposes of gaming, on lands which are located outside the state or states in which the tribe has a current and historical presence. These limitations were drafted to clarify that Indian tribes should be prohibited from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises.

The Senate failed to pass amended H.R. 1920 before it adjourned. Thereafter on February 19, 1987, Senators Inouye, Evans and Daschle introduced S. 555 which was based in large part on the Senate version of H.R. 1920 that was pending at the end of the 99th Congress. This bill was enacted on October 17, 1988, as the IGRA. The comments reported with regard to Section 20 of S. 555, now codified at 25 U.S.C. § 2719, were:

> *New lands.* --Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination.

S. REP. No. 100-446, 100th Cong., 1st Sess. 4, 8 (1988).

In view of the extensive legislative history of H.R. 1920 with regard to newly acquired lands, it is clear that the Congressional recognition of the unique historical and legal differences between lands held by tribes in Oklahoma and reservation lands of tribes in other states, is embodied in the specific provisions of 25 U.S.C. § 2719(a)(2)(A)(i).[5] In essence, as stated in the legislative history to Section 4 of H.R. 1920, the precursor to Section 20 of

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[5]In *Oklahoma Tax Commission v. Sac and Fox Nation*, ___S.Ct.___, (1993), decided on May 17, 1993, the Oklahoma Tax Commission claimed that Indian immunity from state taxes adhered only to reservation Indians, and that because the Sac and Fox members lived on scattered allotments in Oklahoma and not a reservation, Oklahoma taxes applied to them. In dicta, the Supreme Court recognized the unique status of Oklahoma Indian country, by stating that the State lacked jurisdiction to tax within Indian country, whether the particular territory consists of a formal or *informal* reservation, allotted lands, or dependent Indian communities.

S. 555, the limitations are intended to prohibit Oklahoma tribes, like other tribes, from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises, unless otherwise authorized by the Secretary of the Interior after consultation with State officials.

Oklahoma Tribal Lands

Removal of the Five Civilized Tribes from their aboriginal homelands in the southeastern part of the United States to Oklahoma and Arkansas commenced in 1816 with the Choctaw treaties of 1816, 1820, and 1825; and the Cherokee treaties of 1817 and 1828. *See Exhibit 1, Maps A and B.* In the 1830s bands of Senecas and Shawnees, and the Quapaw Tribe were settled north and east of the Cherokee lands. *See Exhibit 1, Map E.* After the Civil War, bands of the Ottawas, Weas, Peorias, Kaskaskias, Piankashaws, Modocs, Wyandottes and Miamis were also settled in the northeastern region.[6]

With little exceptions, the exterior boundaries of the present Cherokee Nation were agreed to by the terms of the Treaty of New Echota, entered into on December 29, 1835, 7 Stat. 478. *See Exhibit 2.* The 1835 Treaty provided that the Nation relinquished all its lands east of the Mississippi for Oklahoma lands it presently occupies and other lands in Oklahoma and Kansas. *See Exhibit 1, Map D.* By the terms of the Treaty of July 19, 1866, Kansas lands were to be sold to the highest bidder for the benefit of the Cherokee Nation and six tracts in Oklahoma, in the area referred to in the 1835 Treaty as the Cherokee Outlet, were sold to other tribes. See *Exhibit 1, Map C.* Since the cessions of 1866, the Cherokee Nation treaty boundaries, set by the 1835 Treaty which comprise 14 counties in eastern Oklahoma, have not changed. Rogers County is included within the boundaries. *See Exhibit 1, Maps F and G.* The City of Catoosa is shown in the Historical Atlas of Oklahoma, published by the University of Oklahoma Press, as being one of the important places in the Cherokee Nation. *See Exhibit 1, Map H.*

The federal allotment policy with regard to the Five Tribes differed from that of other tribes whose tribal lands were allotted pursuant to the General Allotment Act, the Act of February 8, 1887, 24 Stat. 388 (1887). Because the Five Tribes had received fee simple title to their lands, the chiefs of the Tribes made the tribal allotments. By the Act of July 1, 1902, 32 Stat. 716, the Cherokee Nation agreed to allot its tribal lands to its members. Those allotments were made in 1906, after enrollment, in the 14 counties in eastern Oklahoma within the exterior boundaries of the

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[6]By 1855, treaties had been negotiated and renegotiated with the Five Civilized Tribes which resulted in all of the Five Tribes being located in what is now Oklahoma. *See Exhibit 1, Map D.*

Cherokee treaty lands. Historically the Cherokee Nation has exercised governmental authority over this 14 county area as exemplified by the various tribal political divisions shown on Exhibit 1, Map I.

In 1988, pursuant to the terms of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201, *et seq.*, the Secretary of the Interior approved the Cherokee Nation Land Consolidation Plan for the 14 county area. The plan permits the Cherokee Nation to acquire, sell or exchange tribal trust lands within this area without special legislation for the purpose of consolidating tribal land holdings in the area. *See Exhibit 3.* The Muskogee Area Office, Bureau of Indian Affairs, has entered into a compact with the Cherokee Nation authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450, *et seq.*, to provide federal government services to the Indians residing in this 14 county area.

Conclusion

We conclude that the former treaty lands of the Five Civilized Tribes, and specifically the proposed acquisition of the Cherokee Nation in the City of Catoosa, Rogers County, Oklahoma, for gaming purposes, are tantamount to "former reservation lands" as intended by Congress in 25 U.S.C. § 2719(a)(2)(A)(i) and should be accorded that status for purposes of the IGRA. We base this conclusion on the historical and traditional assertion of governmental authority over their treaty lands by the Five Tribes in Oklahoma and the fact that the legislative history to the IGRA suggests that Congress intended that these Oklahoma treaty tribes be accorded the same privileges as reservation tribes.

In this regard, we need not resort to the rules of statutory construction which apply to Indian legislation, although it is clear that those rules mandate this conclusion as well, in that neither the legislative history of the IGRA nor the statute contains a "clear and plain statment" that Congress intended to prohibit gaming on such lands. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221-225 (1982 ed.) for a discussion of the doctrine of statutory construction which requires narrow construction of federal statutes in favor of retention of Indian rights in accord with the trust responsibility.

Please advise if we can assist you further, or if you have any questions.

J. Sharon Blackwell
Field Solicitor

Attachments: Exhibits 1-3

cc: Area Director, Muskogee Area Office, BIA